

No. 08-2262

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT**

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**RAMAH NAVAJO CHAPTER, *et al.*,**  
**Plaintiffs-Appellants,**

**v.**

**KENNETH L. SALAZAR, *et al.*,**  
**Defendants-Appellees**

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**ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO  
The Honorable Senior Judge C. LeRoy Hansen**

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**OPENING BRIEF OF APPELLANTS**

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**ORAL ARGUMENT REQUESTED**

**RULE 26.1 CORPORATE STATEMENT**

Plaintiff-Appellant Ramah Navajo Chapter is a political subdivision of the federally recognized Navajo Nation. Plaintiff-Appellants Oglala Sioux Tribe and Pueblo of Zuni are federally recognized Indian Tribes. None of the Plaintiff-Appellants is incorporated and none issues stock.

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#### STATEMENT OF RELATED CASES

This Court decided a previous appeal in this case, *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455 (1997), Appx. 139.

## **JURISDICTIONAL STATEMENT**

The Ramah Navajo Chapter commenced this action in the district court pursuant to 25 U.S.C. § 450m-1(a) and 41 U.S.C. § 609(a)(1), following exhaustion of remedies under 25 U.S.C. § 450m-1(d) and 41 U.S.C. § 605(a). Appx. 124. The Oglala Sioux Tribe and the Pueblo of Zuni intervened after exhausting remedies. Appx. 152, 1236, 1274. On August 27, 2008, the district court entered final judgment disposing of all claims, Addenda (Add.) A-18 (Appx. 1743). The Notice of Appeal was timely filed October 24, 2008, under Fed. R. App. 4(a)(1)(B). Appx. 1746. This Court has jurisdiction under 28 U.S.C. § 1291.

## **STATEMENT OF THE ISSUES PRESENTED**

Did the United States breach its contract obligations for payment of full “contract support costs” (CSC) under the Indian Self-Determination Act (ISDA) when: (1) appropriations to pay those contract obligations in full were legally available;<sup>1</sup> (2) Congress in any event granted the Secretary “contract authority” to award contracts in “amounts” that were not subject to

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<sup>1</sup> Appellants raised this issue below, at Appx. 791, 827-52, 1307, 1317-32, 1375-80. The district court ruled on the issue at A-10 – A-12 (Appx. 1725-32).

the “availability of appropriations”;<sup>2</sup> (3) the Executive failed to request sufficient funds to meet contract obligations;<sup>3</sup> and (4) under ISDA and the law of this case, ISDA and its contracts must be construed in favor of the Appellant Tribes and the United States has admitted that ISDA can reasonably be construed as the Tribes contend.<sup>4</sup>

### STATEMENT OF THE CASE

This is a class action for breach of contract brought under 25 U.S.C. § 450m-1 of the Indian Self-Determination and Education Assistance Act of 1975, as amended, 25 U.S.C. §§ 450–458aaa-18 (ISDA). Appx. 124; Dkt. 96.

In *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455 (1997) (*RNC*), Appx. 139, this Court reversed the district court and held that the indirect cost ratemaking method the government used for calculating Appellant Tribes’ indirect CSC requirements was contrary to ISDA. That ruling

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<sup>2</sup> Appellants raised this issue below, at Appx. 1315-16, 1323-32. The district court ruled on the issue at Add. A-10 – A-12 (Appx. 1727-29).

<sup>3</sup> Appellants raised this issue below, at Appx. 854-57, 1307, 1332-33, 1580-82. The district court did not address the issue. Add. A-1 (Appx. 1718).

<sup>4</sup> Appellants raised this issue below, at Appx. 1649-60. The district court granted Appellants’ motion to consider the admission, Add. A-16 (Appx. 1716), but did not address it in its opinion, Add. A-1 (Appx. 1718).

applied the Indian canon of construction to resolve an ambiguity central to the construction of the parties' contract, *id.* at 1461-62, and held that:

We therefore agree with Plaintiff that the 1988 amendments to the Act mandate that tribes executing self-determination contracts receive full funding for all reasonable contract support costs associated with self-determination contracts.

*Id.* at 1463.

On remand, the parties entered into two partial settlements on money damage claims. *Ramah Navajo Chapter v. Babbitt*, 50 F. Supp.2d 1091 (D.N.M. 1999); *Ramah Navajo Chapter v. Norton*, 250 F. Supp. 2d 1303 (D.N.M. 2002). A third settlement resolving equitable claims as to rate-making procedures was approved August 27, 2008. Dkt. 1159.

On February 23, 2000, Appellants Ramah and Oglala moved for partial summary judgment seeking a declaration that the government breached its contract obligations to Appellants by failing to pay full contract support costs in FY 1994 and later years, leaving the calculation of damages for later proceedings. Appx. 178, 788-89. Zuni filed an amicus brief in support of the motion, Appx. 1035, and by stipulation later intervened as a party. Appx. 1236, 1274. The government cross moved for summary judgment, arguing that it was excused from paying more because Congress in the subject years earmarked the agency's total CSC appropriation at an amount insufficient to pay full nationwide needs. Appx. 1082. On March 3,

2006, Appellants moved the district court to treat as a party admission statements the United States made acknowledging that, under *Cherokee Nation v. Leavitt*, 543 U.S. 631 (2005) (*Cherokee*), ISDA contracts could reasonably be construed to give rise to liability for full CSCs regardless of whether sufficient appropriated funds were available to pay all contracts. Appx. 1649. The district court granted the motion, Add. A-16 (Appx. 1716), but subsequently ignored the admission. Add. A-1 (Appx. 1718).

By Memorandum Opinion and Order entered August 31, 2006, the district court awarded summary judgment to the government. Add. A-1 (Appx. 1718). The district court held that 25 U.S.C. § 450j-1(b) and Appellants' contracts "make clear that the contractual liability of the Government is subject to the availability of appropriations." Add. A-6. The district court held that the United States is not liable for underpayments of CSC when capped appropriations for CSC are insufficient to pay all contractors their full "contract payments". Add. A-14. It held that other language in ISDA cannot "trump" the proviso in 25 U.S.C. § 450j-1(b), Add. A-9, A13.

The district court did not address the language Congress typically uses to limit an agency's contract authority and it ignored the precise wording of